In the United States Court of Appeals
for the Ninth Circuit

No. 21,027

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOM JOHNSON, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR TOM JOHNSON, INC.

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Tom Johnson, Inc.

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ARGUMENT

I. Substantial Evidence on the Record as a Whole Fails to Support the Board's Finding that Respondent Violated Section 8(a)(3) and (1) of the Act by Discharging Utra and Hoskins Because They Sought Union Support of the Grievances.

The Trial Examiner in his concluded Findings (R. 21)[1] stated his conclusion of the weight and credibility of the evidence as follows:

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[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume 1, pleadings" are designated "R." References to portions of the stenographic

"The testimony of the witnesses upon the issue of the Company's failure to bargain with the Union presents a sharp conflict. Hence, some comment on the demeanor and bearing of the witnesses is warranted. The Trial Examiner is not inclined to accept Johnson's testimony on this point, because portions of his testimony, such as Utra's and Silva's alleged request, that Johnson 'save' their subsistence pay for them, so they would not gamble it away, sounds implausible. Furthermore, the discrepancies between what Johnson charged the Wagon Wheel and paid to the employees, do not recommend the reliability of Johnson. Johnson appears to have been guilty of either sharp dealing or unforgivable laxity in these matters. Either militates against the ready acceptance of his testimony.

"On the other hand, employees Utra and Hoskins both testified volubly, but with the truculence of disgruntled employees. *Their display of vindictiveness toward Johnson, called clearly for a close scrutiny of their testimony.* Silva's testimony had the same taint, but to a lesser degree. The antipathy of these witnesses to Johnson may have been born of a righteous indignation but their attitude did not seem to indicate that feeling. The Trial Examiner deems the testimony of Johnson and the three named employees, the principals, as unacceptable. *However, the two foremen testified in a forthright manner and Denzer and Davis of the employees testified with every indication of*

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transcript reproduced pursuant to rules 10 and 17 of this Court are designated "Tr." "GC Exh." refers to exhibits of the General Counsel; "R. Exh." refers to respondent's exhibits.

accuracy and fairness.''

The testimony of Utra and Hoskins was discredited and the Trial Examiner found that they had been fired for cause (R. 22). In determining whether or not the findings of the Board was based upon substantial evidence in the record as a whole, the Trial Examiner looked to the testimony of Schultz and Cleveland, two foremen, and the testimony of Denzer and Davis, because not only was Utra and Hoskins' testimony disregarded, but the employer, Mr. Duane Johnson's testimony was also disregarded. The record discloses that Johnson continually discussed the controversy with respect to overtime pay and subsistence with the Business Agent from the Union. The Trial Examiner agreed that Schultz was present at a meeting on December 13, 1962 between Crumley and Johnson; and that Crumley explained that the company would have to pay wages according to the contract terms (R. 20). The testimony of Schultz was to the effect that in December, 1962 there were general discussions among employees and among management representatives regarding overtime pay and that on December 13 Crumley, the business agent for the Union, traveled to the job site and told Johnson he would have to pay wages according to the bargaining agreement terms (TR. p. 215).

Looking at the discharge of Utra and Hoskins, the petitioner's Brief clearly sets forth the general rule announced by this Court that matters of credibility are generally for the trier of fact. *N.L.R.B.* v. *I.L.W.U. Local 10, et al*, 283 F. 2nd 558, 562.

It has also been noted that where Trial Examiner and the Board disagree in their conclusions, the evidence

must be examined with greater care than where both Board and Trial Examiner are in agreement. *United Fire Works Mfg. Co.* v. *N.L.R.B.*, 252 F. 2nd, 428.

While the Board refused to agree with the Trial Examiner that the testimony of Schultz and Cleveland deserved to be credited (R. 39), there is apparently no disagreement by the Board on the finding of the Trial Examiner that the testimony of Utra and Hoskins regarding their discharge was not worthy of being credited.

Therefore, the statement of law as set forth in p. 21 of Petitioner's Brief in which Petitioner cited *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659, to the effect that the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next, would seem to apply to Utra and Hoskins as well as Petitioner applied the principle to the two foremen, Schultz and Cleveland.

In determining that Respondent violated Section 8(a)(1) and (5) of the Act by bargaining directly with its employees, the Trial Examiner relied on many factors, including the testimony of Silva and Denzer, discrepancies in the payroll record and the "implausible testimony of Johnson" (R. 21). However, with respect to the question of the discharge of Utra and Hoskins, the Trial Examiner appears to have made that determination based upon the demeanor and bearing of Utra, Hoskins, Schultz and Cleveland as they were testifying. Therefore, it would seem that the determination by the Trial Examiner as to the credibility of these four witnesses should be accorded the weight given them by the Trial Examiner.

Granting for the sake of argument that the testimony

of Johnson was contradictory to that of Schultz and Cleveland with respect to the discharge of Utra and Hoskins, it must be remembered that Johnson's testimony regarding the discharge was not accepted by the Trial Examiner. The real contradiction giving rise to the reason for discharge considered by the Trial Examiner was that between the two foremen, and Utra and Hoskins. The Trial Examiner noted, (R. 20, 21) that Utra's trade was that of a painter. That after this work was completed he was tried at various inside jobs, including paper hanging and stripping, in addition to enameling work. Utra himself admitted doing this work but gave flimsy excuses for its being done in an unsatisfactory manner. Thus, petitioner's statement on p. 21 of his Brief stating that Schultz's testimony was suspect because the enameling work had been completed two weeks before he was laid off, is without merit. Moreover, petitioner's statement that the company's records support the conclusion that Schultz's explanation for Hoskins' discharge was without foundation in fact, is similarly without merit. We only have Hoskins' statement that at the time of his layoff Schultz informed him that the company was laying off everyone who was drawing subsistence and this the Trial Examiner disregarded. It is submitted, therefore, that analysis of the record as a whole has not disclosed any significant deficiencies in the Trial Examiner's credibility resolutions. It is rare that a record contains evidence for one side or the other, which is perfectly uniform. Certain discrepancies always exist and it is submitted that those set forth by petitioner have no significance. It is respectfully submitted, therefore, that there is no substantial evidence on the record as a whole to support the Board's reversal of the Trial Examiner

with respect to the discharge of Utra and Hoskins.

II. Substantial Evidence on the Record as a Whole Fails to Support the Board's Finding That Respondent Violated Section 8 (a)(1) and (5) of the Act by Bargaining Directly With Certain of Its Employees by Unilaterally Changing Its Employees' Conditions of Employment Without Consulting the Union at a Time When the Union Was the Authorized Representative of Its Employees and by Threatening Its Employees With Loss of Overtime Employment. If Anything, the Acts Complained of Constituted a Breach of Contract and the Remedy Would Be to Bring an Action for a Breach of Contract.

If the record shows wrongdoing on the part of Johnson, it shows only that there was a breach of the collective bargaining contract, (GC 3), and that such breach would not constitute unfair labor practice. This being the case, the Courts would be the forum for redress and not the Board. The Trial Examiner found that the discharge of Utra and Hoskins was not unlawfully motivated and Respondent has previously submitted its reasons to show that there was no substantial evidence in the record as a whole to reverse that finding.

In the Case of *Independent Petroleum W. of N.J.* v. *Esso Stand. Oil Co.*, 235 F. 2nd 401, the Court pointed out that a breach of contract was not an unfair labor practice, where pp. 403 and 404, the Court said:

"We are of the opinion that the view of the plaintiff is the correct one and that the District Court erred in dismissing Count 1 of the plaintiff's Complaint.

"In Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 1955, 348 U.S. 437, 75 S. Ct. 489, 99 L. Ed. 510, the Supreme Court specifi-

cally noted that Section 301 of the Taft-Hartley Act confers jurisdiction on federal courts in cases involving breach of collective bargaining contracts. In Note 2, at page 443, of 348 U.S. at page 492 of 75 S. Ct. it said:

'It is significant, however, that breach of contract is not an unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' H. R. Conf. Rep. No. 510, 80th Cong., 1 Sess. 42.'

"That such jurisdiction belongs exclusively to the courts was held by the National Labor Relations Board in *United Telephone Company of the West*, 112 NLRB 779 (1955).

"Said the Board, page 782: 'The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.'

"The Board, citing prior rulings, stated (page 781): 'As the Board has held for many years, with the approval of the courts: ' * * * it will not effectuate the statutory policy * * * for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act.'

"It is pertinent to note that in United Telephone Company of the West, *supra*, the union and employer gave conflicting interpretations to overtime provisions in their collective bargaining contract and when they were unable to agree the employer filed a suit for declaratory

judgment. The Union thereupon filed a complaint with the Board charging unfair labor practices. The Trial Examiner in his Intermediate Report found against the employer. The latter filed exceptions to the Report contending that it had a right to submit the dispute as to the correct interpretation of their contract to the courts rather than to the Board. The Board agreed, stating (page 780): 'Inasmuch as the issue of the construction of the contract is now pending before a court of apparent jurisdiction no valid reason exists for the Board to enter this controversy.'

In *Drake Bakeries* v. *Local 50*, 370 U.S. 254, 8 L. Ed. 2d 474, 82 S. Ct. 1346, it was pointed out at page 480 of 8 L. Ed. 2d as follows:

"In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would 'promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace' (S. Rep. No. 105, 80th Cong., 1st Sess. 17). It was particularly interested in placing 'sanctions behind agreements to arbitrate grievance disputes' (Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456, 1L. Ed. 2d 972, 980, 77 S. Ct. 912). The preferred method for settling disputes was declared by Congress to be '(f)inal adjustment by a method agreed upon by the parties (§ 203 (d) of the Act, 29 USC § 173 (d). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (United Steelworkers of America v. American Mfg. Co. 363 U.S. 564, 466, 4 L. Ed. 2d 1403, 1405, 80 S. Ct. 1363). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this. We could

enforce only the no-strike clause by refusing a stay in the suit for damages in the District Court. We can enforce both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages is arbitrated. This we prefer to do."

and further on page 482 of 8 L. Ed. 2d:

"A strike in violation of contract is not *per se* an unfair labor practice and there is no suggestion in this record that the one-day strike involved here was of that nature. We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union."

In *Cheney California Lumber Company* v. *N.L.R.B.*, 319 Fed. (2) 375, at p. 378 (1963) Judge Merrill of the Court of Appeals, 9th Circuit, said:

"While such a strike does constitute a breach of contract and is an unprotected labor activity, it does not follow that it constitutes an unfair labor practice. As pointed out in International Union, United Mine Workers v. NLRB (1958) 103 U.S. App. D. C. 207, 257 F. 2d 211, 214-215, legislative history of the Taft-Hartley Act shows that it was not intended that violation of a collective bargaining agreement should, *per se*, be held to be an unfair labor practice. Congress rejected such an unfair labor practice proposal. H. R. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947); 1 Legislative History of the Labor Management Relations Act 114, 545-546. Section

301, 29 U.S.C. section 185, indicates that the federal and state courts, not the Board are the proper forum for parties seeking to remedy alleged violations of collective bargaining agreements. United Mine Workers, *supra*, 257 F. 2d at page 215 points out that: 'The Board has heretofore taken the position that it, the Board, 'is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific performance of its terms.'

"Cf. Feinsinger, The National Labor Relations Act and Collective Bargaining, 57 Mich. L. Rev. 807 (1959).

"In NLRB v. Insurance Agents' International Union (1960) 361 U.S. 477, 80 S. Ct. 419, 4 L. Ed. 2d 454, it was held that a resort to unprotected labor activity, in the form of union slowdowns, does not *per se* constitute a refusal to bargain in good faith. The court states, 361 U.S. at pages 495, 496, 80 S. Ct. at page 430:

'* * * (T)he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. * * * It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it.'

"In our judgment the fact that a strike, otherwise wholly consistent with good-faith collective bargaining, constitutes a violation of a no-strike agreement does not, *per se*, render the strike a refusal to bargain in good faith. Cheney has its remedy for damages resulting from

this contract violation. Whether the conduct of the Union in calling the strike constitutes a refusal to bargain in good faith must be determined not on a *per se* basis but upon a scrutiny of the circumstances taken in their entirety. This matter we shall consider later in this opinion."

In *Smith* v. *Evening News Asso.*, 9 L. Ed. 2d 246, the Supreme Court of the United States said in an opinion delivered by Mr. Justice White for the Court:

"Petitioner is a building maintenance employee of respondent Evening News Association, a newspaper publisher engaged in interstate commerce, and is a member of the Newspaper Guild of Detroit, a labor organization having a collective bargaining contract with respondent. Petitioner, individually and as assignee of 49 other similar employees who were also Guild members, sued respondent for breach of contract in the Circuit Court of Wayne County, Michigan. The complaint stated that in December 1955 and January 1956, other employees of respondent, belonging to another union, were on strike and respondent did not permit petitioner and his assignors to report to their regular shifts, although they were ready, able and available for work. During the same period, however, employees of the editorial, advertising and business departments, not covered by collective bargaining agreements, were permitted to report for work and were paid full wages even though there was no work available. Respondent's refusal to pay full wages to petitioner and his assignors while paying the nonunion employees, the complaint asserted, violated a clause in the contract providing that 'there shall be no discrimination against any employee because of his membership or

activity in the Guild.

"The trial court sustained respondent's motion to dismiss for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the Labor Management Relations Act and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board. The Michigan Supreme Court affirmed, 362 Mich. 350, 106 NW 2d 785, relying upon San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773, and like pre-emption cases. Certiorari was granted, 369 U.S.827, 7 L. Ed. 2d 793, 82 S. Ct. 843, after the decisions of this Court in Teamsters, C.W. & H. v. Lucas Flour Co. 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571, and Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 7 L. Ed. 2d 483, 82 S. Ct. 519.

"Lucas Flour and Dowd Box, as well as the later Atkinson v. Sinclair Refining Co. 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318, were suits upon collective bargaining contracts brought or held to arise under § 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the Labor Management Relations Wct and therefore within the exclusive jurisdiction of the National Labor Relations Board. In Lucas Flour as well as in Atkinson the Court expressly refused to apply the pre-emption doctrine of the Garmon case; and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The auth-

ority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301. If, as respondent strongly urges, there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise. This is not one of them, in our view, and the National Labor Relations Board is in accord.

"We are left with respondent's claim that the predicate for escaping the Garmon rule is not present here because this action by an employee to collect wages in the form of damages is not among those 'suits for violations of contracts between an employer and a labor organization * * * ,' as provided in § 301. There is support for respondent's position in decisions of the Courts of Appeals, and in Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp. 348 U.S. 437, 99 L. Ed. 510, 75 S. Ct. 488, a majority of the Court in three separate opinions concluded that § 301 did not give the federal courts jurisdiction over a suit brought by a union to enforce employee rights which were variously characterized as 'peculiar to the individual benefit which is their subject matter,' 'uniquely personal' and arising 'from separate hiring contracts between the employer and the employee.' Id., 348 U.S. at 460, 461, 464.

"However, subsequent decisions here have removed the underpinnings of Westinghouse and its holding is no longer authoritative as a precedent. Three of the Justices in that case were driven to their conclusion be-

cause in their view § 301 was procedural only, not substantive, and therefore grave constitutional questions would be raised if § 301 were held to extend to the controversy there involved. However, the same three Justices observed that if, contrary to their belief, 'Congress has itself defined the law or authorized the federal courts to fashion the judicial rules governing this question, it would be self-defeating to limit the scope of the power of the federal courts to less than is necessary to accomplish this congressional aim.' Id., 348 U.S. at 442. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912, of course, has long since settled that § 301 has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts. 'There is no constitutional difficulty' and § 301 'is not to be given a narrow reading.' Id., 353 U.S. at 456, 457. Section 301 has been applied to suits to compel arbitration of such individual grievances as rates of pay, hours of work and wrongful discharge, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912, *supra;* General Electric Co. v. United Electrical, etc., 353 U.S. 547, 1 L. Ed. 2d 1028, 77 S. Ct. 921; to obtain specific enforcement of an arbitrator's award ordering reinstatement and back pay to individual employees, United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358; to recover wages increases in a contest over the validity of the collective bargaining contract, Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 7 L. Ed. 2d 483, 82 S. Ct. 519, *supra;* and to suits against individual union members for violation of a no-strike clause contained in a collective bargaining agreement. Atkin-

son v. Sinclair Refining Co. 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318, *supra*.

"The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

"The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of unions. The word 'between', it suggests, refers to 'suits', not 'contracts' and therefore only suits between unions and employers are within the purview of § 301. According to this view, suits by employees for breach of a collective bargaining contract would not arise under § 301 and would be governed by state law, if not pre-empted by Garmon, as this one would be, whereas a suit by a union for the same breach of the same contract would be a § 301 suit ruled by federal law. Neither the language and structure of § 301 nor its legislative history require or persuasively support this restrictive interpretation.

which would frustrate rather than serve the congressional policy expressed in that section. 'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' Teamsters, C. W. & H. v. Lucas Flour Co. *supra* (369 U.S. at 103).

"We conclude that petitioner's action arises under § 301 and is not pre-empted under the Garmon rule. The judgment of the Supreme Court of Michigan is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

The changes in this case are basically that there was a refusal to pay proper subsistence and overtime according to the terms of the collective bargaining agreement. The record discloses that there was considerable dispute with respect to the interpretation of the overtime and subsistence provisions of the collective bargaining contract. The Trial Examiner himself pointed this out (R. 16). The Trial Examiner also noted that Utra received a check from Johnson in the sum of $504.00 (GCX 12), through the Business Agent, Crumley. By Hoskins' own testimony it is noted by the Trial Examiner (R. 20) Johnson and Crumley discussed the overtime provisions of the contract. The Trial Examiner also noted the testimony of foreman, Schultz, with regard to a meeting between Johnson and Crumley, the Business Agent, on December 13, 1962, concerning a dispute as to the payment of wages according to the contract terms. It is apparent that there is nothing in the record which indicates that the Union ever requested the Respondent to bargain with them concerning the payment of overtime, nor is there

anything in the record to prove that anyone was not paid the overtime pay required by the contract. It is significant to observe that no official of the Union came forward to testify that Respondent did not bargain with them concerning overtime.

There is nothing in the Act to support the proposition that a breach of contract in payment of wages fixed by the contract would constitute unfair labor practice. Section 8 (a) (5) makes it unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provision of 9 (a). Section 9 (a) provides in part:

> "Providing that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; providing further, that the bargaining representative has been given opportunity to be present at such adjustment."

There is no evidence other than the testimony of Utra and Hoskins to the effect that Johnson attempted to force the employees to work for time and a half instead of double time. It is submitted that when Utra and others talked to Johnson about their subsistence payments in the presence of Crumley, the Business Agent, all of these matters were lawful presentation of grievances, and were apparently settled.

Respondent submits that at most, the facts in this

case amount to a breach of contract and, therefore, redressable in the Courts and not before the Board.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should dismiss the Petition of the Board.

PETER I. BREEN
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Tom Johnson, Inc.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

PETER I. BREEN
Attorney for Respondent,
Tom Johnson, Inc.

APPENDIX A

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Providing that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; providing further, that the bargaining representative has been given opportunity to be present at such adjustment.